

CHAPTER 28

GOVERNMENT INFORMATION PRACTICES

I. FREEDOM OF INFORMATION ACT (FOIA)	1
A. Primary References:.....	1
B. Secondary References:.....	2
II. FOIA INTRODUCTION	3
A. History.	3
B. Key Concepts.....	3
III. FOIA Release of AGENCY RECORDS	3
A. Publication. § 552(a)(1).....	4
B. "Reading Room" Materials.....	4
C. Release Upon Request. § 552(a)(3).	4
D. Other Factors Affecting Release.....	7
E. Reasons For Not Releasing a Record..	8
IV. FOIA EXEMPTIONS	9
A. Exemption 1: Classified Records	9
B. Exemption 2: Internal Personnel Rules and Practices	11
C. Exemption 3: Other Federal Withholding Statutes	12
D. Exemption 4: Trade Secrets, and Commercial and Financial Records	12
E. Exemption 5: Privileged Memoranda & Internal Agency Communications	17
F. Exemption 6: Protection of Personal Privacy	20
G. Exemption 7: Law Enforcement Records	22
H. Exemptions 8 (Financial Institutions Information)	23
I. Exemption 9 (Geological and Geophysical Information)	23
V. FOIA EXCLUSIONS	23
A. Exclusion 1.	23
B. Exclusion 2.	23
C. Exclusion 3.	24
VI. FOIA REQUEST Process	24
A. What Is A Proper Request?.....	24
B. What Must The Agency Do In Response?.....	25
VII. FOIA LITIGATION	29
A. Requester Must Exhaust Administrative Remedies.....	29
B. Circumstances Authorizing Stays Were Narrowed by E-FOIA Amendments.....	29
C. Judicial Review. 5 U.S.C. § 552(a)(4)(B);	29
D. Attorney Fees and Costs. § 552(a)(4)(E).	29
E. Six year statute of limitations for filing FOIA lawsuits.....	30
VIII. FOIA Analysis TEMPLATE . (Appendix A).....	30
IX. PRIVACY ACT (PA)	31
A. Primary References.....	31
B. Secondary References.....	32
X. Privacy Act INTRODUCTION	33
A. History of the Act.	33

B. Congressional Concerns.	33
C. Policy Objectives.	33
XI. SCOPE OF THE Privacy ACT.	33
A. Generally Applicable to Agency Records within a "System of Records."	33
B. Key Definitions.	33
XII. PA PUBLIC NOTICE OF SYSTEMS OF RECORDS. § 552a(e)(4).	36
A. Publication Requirement	36
B. Content of a system notice. § 552a(e)(4)	36
C. Systems Notice Example	37
XIII. PA COLLECTION AND MAINTENANCE OF INFORMATION	39
A. Collect Only Relevant and Necessary Information	39
B. Collect Information to Greatest Extent Practical Directly from the Individual	39
C. No First Amendment Information Collection	39
D. The Privacy Act Advisement	40
E. Accuracy Requirements	41
XIV. PA ACCESS TO AND AMENDMENT OF RECORDS. § 552a(d).	41
A. References:	41
B. Each agency that maintains a system of records shall :	41
C. Burdens of Proof.	41
D. Processing an Access or Amendment Request.	42
E. Time Limits.	42
F. Access Issues.	44
G. Amendment Issues.	46
XV. PA EXEMPTIONS. §§ 552a(j) and (k).	46
A. Exemptions Deny a Subject Access to His Own Records.	46
B. Claiming Exemptions.	46
C. Two General Exemptions. § 552a(j)(1)-(2).	46
D. Seven Specific Exemptions. § 552a(k)(1)-(7).	47
E. One Special Exemption. § 552a(d)(5).	48
XVI. PA DISCLOSURE OF INFORMATION SOR, § 552a(b).	48
A. Disclosure Prohibited. The "no disclosure without consent" rule	48
B. 12 Exceptions to the "no disclosure without consent" rule	49
C. Accounting for Disclosure. § 552a(c).	53
XVII. SOCIAL SECURITY NUMBERS.	53
A. Section 7(a)(1).	53
B. Section 7(b).	53
XVIII. PA CRIMINAL PENALTIES. § 552a(i).	54
A. Knowingly/Willfully Making Prohibited Disclosure	54
B. Willfully Maintaining a System of Records Without Complying with Notice	54
C. Knowingly/Willfully Requesting/Obtaining Information Under False Pretenses.	54
D. Action is against the individual and not the agency.	54
XIX. PA CIVIL REMEDIES.	55
A. Statutory. § 552a(g).	55
B. Constitutional Tort. <u>Perry v. FBI</u> , 759 F.2d 1271 (7th Cir. 1985).	56
XX. Conclusion.	57

FREEDOM OF INFORMATION ACT

Outline of Instruction

I. FREEDOM OF INFORMATION ACT.

A. Primary References:

1. Freedom of Information Act, 5 U.S.C. § 552, as amended.
2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (29 September 1997).
3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (4 September 1998) (includes 1996 amendments to the Freedom of Information Act).
4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (14 April 1997) (does not include 1996 amendments to the Freedom of Information Act).
5. Air Force Supplement to DOD 5400.7-R (22 July 1999), *superseding* AF Instruction 37-131 (16 February 1995) [hereafter DOD5400.7-R/AFSUP1].
6. Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program (6 January 1999); JAGINST 5720.3 (10 May 1991) (Assigns responsibility within OJAG).
7. Marine Corps Order 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (W/CH1 2 August 1991); Marine Corps Order P5720.56A, Availability to Public of Marine Corps Records (26 February 1985).

B. Secondary References:

1. Freedom of Information Act Guide & Privacy Act Overview (May 2000), a biennial Department of Justice publication (available on the World Wide Web at <http://www.usdoj.gov/foia> -- requires an Acrobat reader) [hereinafter DOJ FOIA Guide].
2. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.
3. Freedom of Information Case List (September 1998), a biennial Department of Justice publication.
4. FOIA UPDATE, a newsletter issued quarterly by the Justice Department's Office of Information and Privacy (OIP), Suite 570 FLAG, Washington, D.C. 20530.
5. Web Site Resources:
 - a. Army FOIA/Privacy Website -
<<http://www.rmd.belvoir.army.mil/FOIAMain.htm>>
 - b. Navy FOIA Website – <<http://foia.navy.mil/resources.html>> (links to FOIA sites of major Navy commands).
 - c. Marine Corps FOIA Website –
<<http://www.hqmc.usmc.mil/foia.usf>>
 - d. Air Force FOIA Websites –
 - (1) <<http://www.foia.af.mil/>>
 - (2) < <https://wwwmil.acc.af.mil/ja/foia.htm> > – This site provides guidance based on the specific type of record requested. Good starting place, but not the definitive answer in all cases.

II. FOIA INTRODUCTION.

- A. History.
- B. Key Concepts.
 - 1. Disclosure is the rule, not the exception.
 - 2. The status and purpose of a requester are irrelevant.
 - 3. The government has the burden to justify withholding of information.
 - 4. The requester may seek administrative and judicial relief if access to government information is improperly denied.

III. FOIA RELEASE OF AGENCY RECORDS.

- A. Publication. § 552(a)(1) (Requires disclosure of agency procedures, substantive rules, functions, organization and general policy through Federal Register publication).
 - 1. How to obtain information from the agency: DOD Reg. 5400.7-R, AR 25-55, DOD 5400.7-R/AFSUP1, SECNAVINST 5720.42F, and MCO 5720.63.
 - 2. Rules of procedure and how to make submissions to the agency: Federal Acquisition Regulation (FAR), DOD FAR Supp., and Army FAR Supp. (AFARS).
 - 3. Substantive rules of general applicability. NI Industries v. United States, 841 F.2d 1104 (Fed. Cir. 1988); Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991)

- B. “Reading Room” Materials. § 552(a)(2) (Requires agency to make “available for public inspection and copying” records of final opinions, agency orders, and frequently requested material.).
1. Final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals. Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164 (D.C. 1989).
 2. Copies of disclosed records, frequently requested under FOIA. Stanley v. Department of Defense, et al., No. 98-CV-4116 (S.D. Ill. June 22, 1999) (military hospital operational manuals are "internal housekeeping rules" as opposed to the kind of material of interest to the general public.)
 3. Reading Room records created after 1 November 1996 must be available on an agency's web site.
 4. The agency does not need to make available materials “related solely to the [agency’s] internal personnel rules and practices.” Hamlet v. United States, 63 F.3d 1097 Fed. Cir. 1995), see, DOJ FOIA Guide.
 5. Index for Public Inspection.
- C. Release Upon Request. § 552(a)(3).
1. Applies to “agency records.”

Congress is not an agency for purpose of FOIA. Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990).

- a. What is an “agency?” § 552(f). An Agency is a Department of the Executive Branch. Does not include: Congress, Judiciary, Office of the President (including Advisors). Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990) (Congress is not an agency for FOIA); Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 1842 (1997). Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) cert. denied, Dong v. Smithsonian Inst., 524 U.S. 922 (1998). (holding that Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive department status necessary under § 552(f)).
- b. What is a “record?” - “Readily Retrievable and Reproducible.” Examples include: Paper records, photographs, maps and e-mail messages.” DOD Reg. 5400.7-R, para. C1.4.3.1; AR 25-55, para. 1-402(a) (“machine readable materials ... regardless of physical form”); DOD5400.7-R/AFSUP1, para. SECNAVINST 5720.42F, para. 4b(1); MCO P5720.56A, para. 2001.
- c. What is not a “record?” Physical Objects (e.g. structures), Personal Records. DOD Reg. 5400.7-R, para. C1.4.3.2; AR 25-55, para. 1-402(b); DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b(2); MCO P5720.56A, para. 2001.
- d. An agency must possess and control the record. DOD Reg. 5400.7-R, para. C1.4.3.3; AR 25-55, para. 1-402(c). AFR 12-30, para. 2j; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003. Department of Justice v. Tax Analysts, 492 U.S. 136 (1989).
 - (1) Other agency records. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).
 - (2) Records generated from sources outside the Government. Records must be either government-owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996); Hercules, Inc. v. Marsh, 838 F.2d 1027 (4th Cir. 1988).

- (3) Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others for agency use. DOD Reg. 5400.7-R, para. C1.4.3.2.3; Gran Cent. Partnerships, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) (holding affidavit by supervisor stating subordinates' handwritten notes were "personal records" was insufficient to prove them to be not "agency records") Bureau of Nat'l Affairs v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984).
 - (4) Research Data. Amendment to the Fiscal Year 1999 Omnibus Appropriations Bill required modification of OMB Circular A-110 to allow private parties access to non-profit grantee-held research data through FOIA request (modifying Supreme Court decision in Forsham v. Harris, 445 U.S. 169 (1980)).
- 2. FOIA does not require agencies to create or retain records. DOD Reg. 5400.7-R, para. C1.4.3.2.3; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f; MCO P5720.56A, para. 2003.
 - a. A request for uncompiled data (selective information) is not a request for records. Borom v. Crawford, 651 F.2d 500 (7th Cir. 1981) (affirming summary judgment order denying request for parole data compiled by race when no such compilation existed); Krohn v. DOJ, 628 F.2d 195 (D.C. Cir. 1980).
 - b. The 1996 amendments to the Freedom of Information Act (the Electronic Freedom of Information Act Amendments, or "EFOIA") require "reasonable efforts" in conducting electronic searches, and give the requester choice of format, where readily reproducible. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998).
 - c. DOD components may create a new record when more useful to requester or less burdensome to agency. DOD Reg. 5400.7-R, para. C1.5.7; AR 25-55, para. 1-506; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 5f.

- d. Note: while FOIA does not require agencies to create or retain records, the Federal Records Act (now known as the National Archives Act), 44 U.S.C. § 2101 et seq., does require record retention pursuant to National Archives and Records Administration schedules. When this outline was printed, the National Archivist was involved in litigation over his orders concerning the retention/destruction of electronic mail/messages.

D. Other Factors Affecting Release.

- 1. Rule of Segregability. § 552(b); DOD Reg. 5400.7-R, para. C5.2.4.
 - a. Must segregate and release portions of agency records not subject to a withholding exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).
 - b. Nonexempt material is not “reasonably segregable” when efforts to segregate amount to an inordinate burden on the agency. Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).
- 2. Status and purpose of requester.
 - a. As a general rule, status and purpose of the requester are not considered by the agency except in deciding procedural matters such as fee issues. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).
 - b. A foreign government is a person under the Act. DOD Reg. 5400.7-R, para. C5.1.3; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).
- 3. Discretionary Release of exempt records -- the "foreseeable harm" standard, or "Reno Rules."

- a. DOJ policy: the Attorney General (AG) has stated that the FOIA's "primary object" is to achieve "maximum responsible disclosure of government information." The AG stated "it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." The AG "strongly [encourages] FOIA officers to make 'discretionary disclosures' whenever possible under the Act." The AG does, however, recognize a presumption of "foreseeable harm" attaches to exemptions 1,3,4,6, and 7(C). When an agency concludes that requested information falls within a "foreseeable harm" exemption, it is not appropriate for discretionary FOIA disclosure. This is because the "foreseeable harm" exemptions correspond to other distinct prohibitions on information disclosure that operate independently of the FOIA. Sources: Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (October 4, 1993); Freedom of Information Act Guide & Privacy Act Overview (May 2000), "Discretionary Disclosure and Waiver"; Attorney General's Memorandum (September 3, 1999) (reiterating Clinton Administration's "openness-in-government" policy).
- b. DOD policy: DOD Reg. 5400.7-R para. C1.5.5. DOD policy conforms to DOJ policy and favors release of exempt material unless there is "foreseeable harm to the government." The presumption of "foreseeable harm" includes exemptions 1,3,4,6, 7(C), and 7(F).
- c. When a DOD agency determines that requested information clearly falls within exemptions 1,3,4,6,7(C), and 7(F), it cannot make a discretionary disclosure.
- d. Exemptions 4, 6 and 7(C) cannot be asserted when the requester is the submitter of the information. DOD Reg. 5400.7-R para. C1.5.5

E. Reasons For Not Releasing a Record. DOD Reg. 5400.7-R, para. C5.2.2.

1. No responsive records after a "reasonable" search.
2. Record transferred.

3. Agency neither controls nor otherwise possesses record.
4. Insufficient description of record.
5. Failure to comply with agency's procedural requirements.
6. Request is withdrawn.
7. Fee dispute.
8. Duplicate Request.
9. The information is not, definitionally, a "record." Oglesby v. U.S. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).
10. The request is denied in whole or part IAW with FOIA.

IV. FOIA EXEMPTIONS.

A. Exemption 1: Classified Records.

1. Executive Order (EO) 12,958 (April 17, 1995), 3 C.F.R. § 335 (1996); 50 U.S.C. § 435 (1996); implemented by DOD 5200.1-R, AR 380-5, AFR 205-1, and OPNAVINST 5510.1. Current order superseded EO 12,356 (1982).
 - a. Security classifications: Confidential, Secret, Top Secret.
 - b. For official use only (FOUO). See DOD Reg. 5400.7-R, C4.1.2; and C4.2.1; AR 25-55, ch. IV; SECNAVINST 5720.42F, para. 10; MCO P5720.63W/CH1, para. 4c. While not an Exemption 1
2. Proper classification.

- a. Court conducts “de novo” review of both procedural and substantive propriety of classification. Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980).
 - b. Court may conduct “in camera” inspection in its sound discretion, although the court should give substantial weight to agency affidavits. Young v. CIA, 972 F.2d 536 (4th Cir. 1993).
 - c. Courts will give great deference to agency’s expertise and judgment on classification. Weatherhead v. United States, 157 F.3d 735 (9th Cir. 1998), cert. granted, 120 S. Ct. 34 (1999), cert. dismissed and vacated, 120 S.Ct. 577 (1999)(Court dismisses for mootness, but vacates 9th Circuit’s holding that classification decisions are not given deference unless agency first makes acceptable showing of harm.); Goldberg v. Department of State, 818 F.2d 71 (D.C. Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).
3. Segregability applies even in Exemption 1 cases. Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).
 4. Operational Security.
 - a. Post-request classification is authorized. E.O. 12,958, section 1.8(d), DOD Reg. 5400.7-R, para. C3.2.1.1, No. 1, AR 25-55, para. 5-100c; DOD5400.7-R/AFSUP1, C3.2.1.1.2; SECNAVINST 5720.42F, Enclosure (2), para 1.
 - b. Compilation/Mosaic Theories of classification (circumstances when apparently harmless items of information, assembled together, reveal classified information). American Friends Serv. Comm. v DOD, 831 F.2d 441 (3d Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). Is not limited only to Exemption 1 situations.

- c. Previous Release of Classified Records Does Not Prevent Subsequent Withholding of Similar Type of Information. Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 15, 1999)(CIA properly withheld it's fiscal year 1999 total budget request because it may damage national security and reveal "intelligence sources and methods" even though it released the previous two years' budgets).
5. Glomar denial/Glomarization (agency refusal to confirm or deny the existence/nonexistence of requested information whenever the fact of its existence/nonexistence is itself classifiable). DOD Reg. 5400.7-R, para. C3.2.1.1.1, Number 1(a); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Is not limited only to Exemption 1 situations.

B. Exemption 2: Internal Personnel Rules and Practices.

- 1. Trivial matters - "low 2." DOD Reg. 5400.7-R, para. C3.2.1.2.2; Department of the Air Force v. Rose, 425 U.S. 352 (1976); Pruner v. Department of the Army, 755 F.Supp. 362 (D. Kan. 1991).
- 2. Circumvention of agency regulation - "high 2."
 - a. Proper: Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988); Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981)(en banc) (withholding from ex-con who seeks ATF surveillance manuals); DOD Reg. 5400.7-R, para. C3.2.1.2, No. 2; AR 25-55, para. 3-200, No. 2; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2); MCO P5720.56A, para. 6002, subpara. 2. See also Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).
 - b. Improper: Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998)(holding that medical malpractice settlement statistics in electronic database were not "internal personnel rules or practices," even though disclosure "would compromise the government's bargaining position.").

C. Exemption 3: Other Federal Withholding Statutes.

1. FOIA Exemption 3 permits withholding of information prohibited from disclosure by another statute. One of two disjunctive requirements must be met to withhold under this exemption: the withholding statute must either "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.
2. Examples of commonly used federal withholding statutes:
 - a. 42 U.S.C. § 290dd-3, Confidentiality of patient records in an alcohol and drug treatment program.
 - b. 10 U.S.C. § 1102, DOD Medical Quality Assurance Records.
 - c. 10 U.S.C. § 2305 and 41 U.S.C. § 253b, prohibiting release of certain contractual proposals.
 - d. 10 U.S.C. § 130(b), allows withholding of information on personnel of overseas, sensitive, or routinely deployable units.
3. Statutes commonly mistaken for Exemption 3 withholding statutes:
 - a. 18 U.S.C. § 1905. The Trade Secrets Act (not an Ex. 3 statute).
 - b. 5 U.S.C. § 552a. The Privacy Act (not an Ex. 3 statute).

D. Exemption 4: Trade Secrets, and Commercial and Financial Records.

FOIA permits withholding records that are “trade secrets and commercial or financial information obtained from a person that are privileged or confidential;”

1. From a person. Generally, all but the Federal Government are “persons” subject to Ex. 4 protection. Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977).
2. Trade Secrets. A narrow definition for purposes of FOIA. Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

“[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”

OR

3. Commercial or financial information. Nonprofit entities can submit commercial information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992); American Airlines, Inc. v. National Mediation Bd., 588 F. 2d 863 (2d Cir. 1978).
 - a. Privileged information. Rarely used as a basis for withholding. Sharyland Water Supply Corp. v. Black, 755 F.2d 397 (5th Cir.); Indian Law Resource Center v. Department of the Interior, 477 F. Supp. 144 (D.D.C. 1979).
 - b. Confidential information. Key definition used as a basis of withholding. Case law has differentiated between “Required” and “Voluntary” submissions of information. Discussed below. DOD 5400.7-R, para. C3.2.1.4, No. 4; AR 25-55, para. 3-200, No. 4; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, Enclosure (2), para. 4; MCO P5720.56A, para. 6002, subpara. 4.
 - (1) *REQUIRED* Information. National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
 - (a) The National Parks test.

- (i) Would disclosure likely "impair ability of agency to obtain necessary information in the future"? See Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980).

OR

- (ii) Would disclosure likely cause "substantial harm to the competitive position of the person from whom the information was obtained"? See Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (holding no competition for Radford Army Ammunition Plant contract); Gulf & Western Industries Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).
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- (b) How does agency determine confidentiality? See EO 12,600 (June 23, 1987) and DOD Reg. 5400.7-R, para. C3.2.1.4.8; AR 25-55, para. 5-207; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 9N(1); MCO P5720.56A, para. 4006, subpara. 8.
 - (c) Must develop and implement procedures to create a complete "administrative record" that will support the agency's decision to release the requested information under FOIA. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) ("Reverse FOIA" case). See Federal Electric Corp. v. Carlucci, 866 F.2d 1530 (D.C. Cir. 1989) (An example of failing to create an Agency Record).
 - (d) Case law analyses of the "substantial harm to the competitive position of the person from whom the information was obtained."

- (i) Cases finding competitive harm: McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999)(holding that release of unit price in rocket contract substantiates substantial competitive harm allowing customers to “ratchet down” prices); Gilmore v. United States Dep't of Energy, No. 95-0285 (N.D. Cal. Mar. 13, 1998); RMS Indus. v. DOD, No. C-92-1545 (N.D. Cal. Nov. 24, 1992); Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979); National Parks, *supra*.
 - (ii) Cases finding *no* competitive harm: GC Micro Corp. v. DLA, 33 F.3d 1109 (9th Cir. 1994); Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345 (9th Cir. 1990) (reverse FOIA); Hercules, Inc., *supra*.
 - (e) FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), now requires disclosure of unit prices, upon request, in government contracts solicited after 1 January 1998. Unit prices (as well as other items in an unsuccessful proposal) of unsuccessful offerors are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2).
4. *VOLUNTARILY* Submitted Information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).
- a. The Critical Mass test.

- (1) Was the information provided voluntarily?

Contract bids and proposals are considered "required submissions" and therefore releasability is analyzed under the National Parks analysis. McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (Information provided in response to a Request for Proposals is a required submission); *see also* DFOISR Memorandum, SUBJECT: FIOA Policy on DOD application of Critical Mass (etc.), 93-CORR-014, 27 July 1993; DFOISR

Memorandum, SUBJECT: Internal Guidance on DOD Application of Critical Mass (etc.), 93-CORR-094, 23 March 1993.

AND

- (2) Is it the kind of information that the provider would not customarily make available to the public? Animal Legal Defense Fund v. Dep't of the Air Force, 44 F.Supp. 2d 295 (D.D.C. 1999)(holding that the Vaughn declaration regarding the withholding of records about Chimpanzee disposal failed to meet voluntariness test because it did not explain: 1)"commercial" nature of record, 2) that the information was provided voluntarily or 3) that the submitter customarily withholds such information from the public).
5. Determining whether business information is exempt--notice of proposed release to the submitter of information--"Reverse FOIA" (Should you disclose purportedly exempt (b)(4) information?). EO 12,600 (July 23, 1987); DOD Reg. 5400.7-R, para. C3.2.1.4.8 and C5.2.8.; AR 25-55, para. 5-207.
 - a. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Discretionary release permissible if otherwise "authorized by law."
 - (1) Reverse FOIA. Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985).
 - (2) Standard of review of agency action under Administrative Procedure Act (APA)--review on the administrative record using the arbitrary and capricious standard. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).
 - b. Trade Secrets Act. 18 U.S.C. § 1905; CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).
 - (1) Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosure except as "authorized by law."

- (2) FOIA provides such "authority" to disclose business information only if it is nonexempt. CNA Fin. Corp., supra.
- (3) Submitter notice (i.e., notice of proposed release to the submitter of information) for disclosure of contractor's unit price not required because disclosures pursuant to a properly promulgated and statutorily based agency regulation, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), are "authorized by law." Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979).
- c. DOD solution. DOD Reg. 5400.7-R, paras. C3.2.1.4 and C5.2.8.1 – C5.2.8.3. (Compare AR 25-55, para. 3-101 (No release absent "compelling public interest")). Remember, DOD presumption of "foreseeable harm" concerns exemptions 1,3,4,6,7(C), and 7(F). The DOJ presumption of "foreseeable harm" concerns exemptions 1,3,4 6, and 7(C).

E. Exemption 5: Privileged Memoranda & Internal Agency Communications.

The FOIA permits withholding records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency;"

- 1. Purpose.
- 2. Scope.
 - a. Deliberative Process Privilege.

- (1) Purpose--to encourage open, frank discussions between subordinates and superiors; protect against premature disclosure of proposed policies before they are adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Judicial Watch, Inc. v. United States Dep't of Justice, No. 97-2869 (D.D.C. Feb 22, 2000)(deliberative process privilege protects handwritten notes by the Attorney General which reflect distillations of issues that she memorialized for later reference as part of her decision making process.).
- (2) "Factual-deliberative" distinction.
 - (a) Deliberative process privilege does not generally protect purely factual matters. EPA v. Mink, 410 U.S. 73 (1973).
 - (b) Can withhold facts if they are "inextricably intertwined" with deliberative material. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980); Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871 (D.D.C. 1989).
 - (c) May withhold facts if release would disclose "deliberative process." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (holding that "Exemption five is intended to protect the deliberative process of government and not just deliberative material. . . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).")
- (3) "Predecisional v. Postdecisional" distinction.

- (a) May withhold predecisional documents. NLRB v. Sears, 421 U.S. 132 (1975); To determine whether a document is “predecisional,” ask, “Was it prepared to assist an agency decision maker in arriving at a decision rather than support a decision already made?” Lurie v. Dep’t of the Army, 970 F.Supp. 19, 28 (D.D.C. 1997).
 - (b) Cannot withhold predecisional materials when final decision-maker “expressly adopts or incorporates them by reference.” NLRB v. Sears; Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981).
- (4) Memoranda prepared by outside consultants fall within the privilege. Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989).
- b. Attorney Work-Product Privilege.
 - (1) Materials “prepared in anticipation of litigation or for trial by or for [a] party or by or for that...party’s representative (including the...party’s attorney, consultant, ...or agent).” Fed.R.Civ.P. 26(b)(3); FTC v. Grolier, 462 U.S. 19 (1983); Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991).
 - (2) Courts have recognized that the privilege extends to prepared in anticipation of litigation even when no specific claim is pending. Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992) (holding that documents that provide tips on handling future litigation are covered by the work product privilege).
- c. Attorney-Client Privilege. The confidential communications from clients to the counsel made for the purpose of securing legal advice or services; and the communications from attorneys to their clients if the communications rest "on confidential information obtained from the client." In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984). Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

- d. Trade Secrets Or Commercial Information Privilege. Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979); Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd 762 F.2d 138 (D.C. Cir. 1985) (table cite).
- e. Protection Of Certain Confidential Witness Statements. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984); Ahearn v. Department of the Army, 583 F. Supp. 1123 (D. Mass. 1984).

F. Exemption 6: Protection of Personal Privacy.

FOIA permits withholding records that are “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;”

- 1. Threshold determination- “personnel and medical files and similar files...” Department of State v. Washington Post Co., 456 U.S. 595 (1986); Department of the Air Force v. Rose, 425 U.S. 352 (1976); New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).
- 2. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). See also, Bibles v. Oregon Natural Desert Association, 117 S.Ct. 795 (1997).
 - a. Invasion of privacy -- define privacy interest involved.
 - (1) Deceased persons have no privacy rights. Na Iwi O Na Kupuna v. Dalton, 894 F.Supp 1397 (D. Hi. 1995) (Reverse FOIA suit).
 - (2) Next-of-kin may have, in rare situations, a colorable privacy interest. New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc). But see, Outlaw v. Department of the Army, 815 F.Supp. 505 (D.D.C. 1993).

- b. Public interest in disclosure -- the Reporters Committee decision has limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "[shed] light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve."
3. Application of the balancing test.
 - a. Articulate the privacy interest involved.
 - b. Articulate the public interest involved.
 - c. Strike the balance.
4. Examples. FLRA v. DOD, 114 S.Ct. 1006 (1994) (a leading case delineating the "core interests" of FOIA; thorough balancing of interests analysis); Sheet Metal Workers Int'l Ass'n. v. United States Air Force, 63 F.3d 994 (10th Cir. 1995) (Sheet Metal Workers union engaged in "Davis-Bacon" monitoring--release of payroll records with names and addresses of workers employed on government contracts constitutes a clearly unwarranted invasion of personal privacy); McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (names of persons exonerated by investigation protected from disclosure); Providence Journal Co. v. Department of the Army, 981 F.2d 552 (1st Cir. 1992) (the higher the rank, the greater the public interest might be in release of agency record concerning disciplinary action); Chin v. Department of the Air Force, No. 97-2176 (W.D. LA June 24, 1999) (deciding two issues: 1) that privacy outweighed the public interest in withholding of identities in general request ro fraternization investigations and 2) that entire investigation can be withheld in request for specific investigation); Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) (denial of request for dismissed non-judicial punishment proceeding documents because public interest was minimal and would shed little light on Air Force's overall conduct).
5. Privacy Glomarization. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993); DOD Reg. 5400.7-R, para. C3.2.1.6.5.1-2.

G. Exemption 7: Law Enforcement Records.

1. Records or information compiled for law enforcement purposes.
 - a. Only applies to investigations conducted for a law enforcement purpose. Compare Irons v. Bell, 596 F.2d 468 (1st Cir. 1979) with Church of Scientology v. Department of the Army, 611 F.2d 738 (9th Cir. 1980). See AR 25-55, para. 1-407.
 - b. Information that was originally compiled for law enforcement purposes, but later summarized in a new document not prepared for law enforcement purposes, is protected under the exemption. Abramson v. FBI, 456 U.S. 615 (1982).
 - c. Exemption will protect non-law enforcement records that are “recompiled” for law enforcement purposes. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).
2. May withhold records under this exemption, but only to the extent disclosure:
 - “(A) could reasonably be expected to interfere with enforcement proceedings,
 - “(B) would deprive a person of a right to a fair trial or an impartial adjudication,
 - “(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
 - “(D) could reasonably be expected to disclose the identity of a confidential source. . . in a criminal or national security investigation . . . or information furnished by a confidential source,

“(E) would disclose techniques and procedures or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law, or

“(F) could reasonably be expected to endanger the life or physical safety of any person.”

3. Glomar Responses are also appropriate to protect privacy under Exemption 7(C). DOD Reg. 5400.7-R, para. C3.2.1.7.1.3.1-3.
4. Exemption 7(C) may protect privacy of the close survivors of the deceased. Accuracy in Media v. National Parks Serv., 194 F.3d 120 (D.C.Cir. 1999)(holding that autopsy photos could be withheld because of the privacy interests of the spouse, parents, and children of the deceased”).

H. Exemptions 8 (Financial Institutions Information).

I. Exemption 9 (Geological and Geophysical Information).

V. FOIA EXCLUSIONS.

A. Exclusion 1.

1. Investigation or proceedings involving possible violation of criminal law, and
2. Subject unaware of pendency of investigation or proceedings, and
3. Disclosure of existence of records could reasonably be expected to interfere with enforcement proceedings.

B. Exclusion 2.

1. Informant records maintained under informant’s name or personal identifier, and

2. Maintained by a criminal law enforcement agency,
 3. Unless informant's status as an informant has been officially confirmed.
- C. Exclusion 3.
1. Records maintained by FBI, and
 2. Pertaining to foreign intelligence or counterintelligence, or international terrorism, and
 3. Existence of records is classified.

VI. FOIA REQUEST PROCESS.

- A. What Is A Proper Request?
1. Must request an "agency record." DOD Reg. 5400.7-R, para., 1-402; AR 25-55, para. 1-402; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 4b; MCO P5720.56A, para. 2001.
 2. Must reasonably describe the record. DOD Reg. 5400.7-R. para., 1-507; AR 25-55, para. 1-507; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, paras. 5e and 9a(2); MCO P5720.56A, paras. 7a(2), 7h(3). See Ruotolo v. Department of Justice, 53 F.3d 4 (2d Cir. 1995); AFGE v. Department of Commerce, 907 F.2d 203 (D.C. Cir. 1990); Mason v. Calloway, 554 F.2d 129 (4th Cir.).
 3. Must comply with agency rules.
 - a. Written request required. DOD Reg. 5400.7-R, para. 1-401 ("written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.") AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

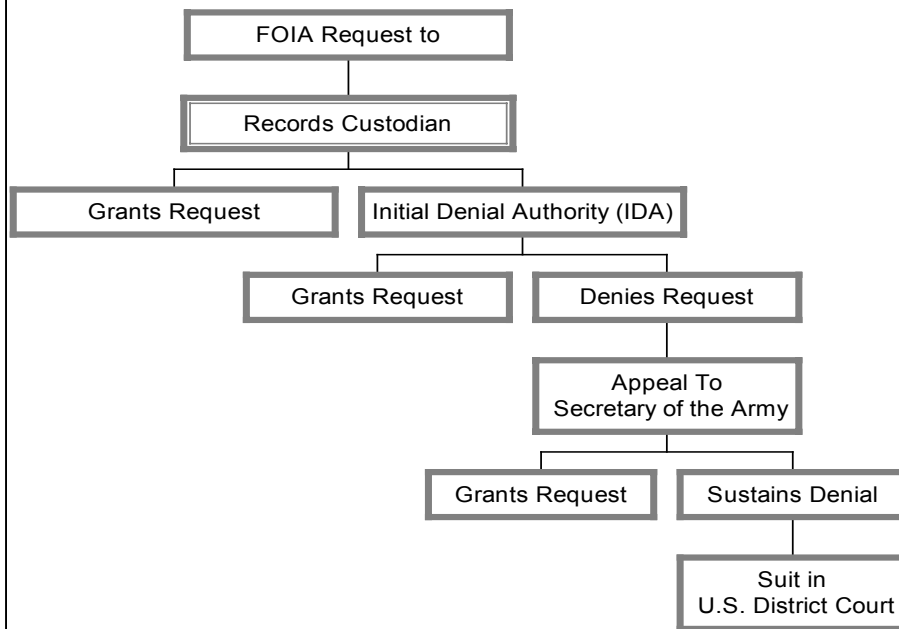
- b. Must express willingness to pay fees. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503 1-509; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(3); MCO P5720.56A, paras. 2003 and 4000.
- c. Must direct request to the proper custodian. DOD Reg. 5400.7-R, 1-503; AR 25-55, para. 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7h(1); MCO P5720.56A, para. 4003, subpara. 4.
- d. Must expressly or impliedly invoke FOIA or an implementing regulation. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 7a(1); MCO P5720.56A, paras. 2003 and 4000.

B. What Must The Agency Do In Response?

- 1. Statutory time limits. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii); 552(a)(6)(B)(i).
 - a. Initial agency response - 20 working days.
 - b. Time period for processing a FOIA request may be extended by 10 working days by written notice to the requester explaining why an extension is needed and stating when a determination will be made on the request.
 - c. Requester dissatisfied with agency response - shall be advised to file an appeal so that it reaches the agency appellate authority no later than 60 calendar days from the date of receipt of the agency response. DOD Reg. 5400.7-R, para. 5-302; AR 25-55, para. 5-302.
 - d. Agency response to Appeals - 20 working days.

- e. If agency shows failure to meet time limits was result of exceptional circumstances and it is applying due diligence in processing request, then court can allow additional time for administrative processing of request. §552(a)(6)(C). Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).
 - f. An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review. § 552(a)(6). See, Spannaus v. United States Dep't of Justice, 824 F. 2d 52 (D.C. Cir. 1987).
2. Agency must make "reasonable efforts" to locate records and court may require agency to demonstrate adequacy of search Valencia-Lucena v. United States Coast Guard, 180 f.3d 321 (D.C. Cir. 1999) (agency failed to conduct reasonable search for missing pages of ship's logbook); Dayton Newspapers, Inc. v. Department of the Air Force, 35 F.Supp. 2d 1033 (S.D. Ohio 1998)(holding that 51 hours of electronic searching and assembly is "small price to pay"); Oglesby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Marks v. United States, 578 F.2d 261 (9th Cir. 1978). But see Ruotolo v. Dep't. of Justice, 53 F.3d 4 (2d Cir. 1995).
 3. Agency must **segregate and release** nonexempt information. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Dynalelectron Corp. v. Department of the Air Force, No. 83-3399 (D.D.C. Oct. 30, 1984).
 4. Service's release and processing procedures. DOD Reg. 5400.7-R, ch. 5; AR 25-55, ch. V; DOD5400.7-R/AFSUP1; SECNAVINST 5720.42F, para. 8; MCO P5720.56A, ch. 4.

FOIA PROCESSING CHART



Fees and Fee Waivers. DOD Reg. 5400.7-R, ch. 6.

5. Fee charges are based on status and purpose (motive) of requester - three categories of requesters.
 - a. First - Most favored category: (1) educational or noncommercial scientific institutions (whose purpose is scholarly or scientific research) or (2) representatives of the news media are charged only for duplication costs after the first 100 pages. National Security Archive v. Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989); Stanley v. Department of Defense, et al. No. 98-CV-4117 (S.D. Ill. June 22, 1999).
 - b. Second - Least favored category: requesters of records for commercial use are charged for search, duplication, and review.
 - c. Third category: All other requesters are charged for search after the first 2 hours and duplication after the first 100 pages.
6. Fee waiver, unlike the substantive FOIA analysis, is based on status and purpose (motive) of requester.
 - a. Fee waiver standard. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (applying and implicitly approving DOD's regulatory implementation of fee waiver provision).
 - b. "\$15.00 Rule." Automatic waiver applies if costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category. DOD Reg. 5400.7-R, para. 6-103, AR 25-55, para. 6-103.
 - c. "\$250.00 Rule." When the agency estimates or determines that allowable charges are likely to exceed \$250.00, notify the requester and obtain satisfactory assurance of full payment, or for advance payment of up to full amount in the case of requester with no history of payment. DOD Reg. 5400.7-R, para. 6-104b(6). AR 25-55, para. 6-104b(6).

VII. FOIA LITIGATION.

- A. Requester Must Exhaust Administrative Remedies. 5 U.S.C. § 552(a)(6)(C)(i); Ogelsby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).
- B. Circumstances Authorizing Stays Were Narrowed by E-FOIA Amendments. 5 U.S.C. § 552(a)(6)(ii); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).
- C. Judicial Review. 5 U.S.C. § 552(a)(4)(B); DOD Reg. 5400.7-R, ch. 5, sec. 4.
 - 1. Scope of review - de novo.
 - 2. In camera inspection is "within the broad discretion of the court." Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996).
 - 3. Vaughn index. A court may order an agency to submit a detailed index of the documents it seeks to withhold and the reasons justifying such withholding. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Compare, Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) with Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).
 - 4. Burden of proof. Burden is on the government to establish that a document is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).
- D. Attorney Fees and Costs. § 552(a)(4)(E). Weisberg v. DOJ, 848 F.2d 1265 (D.C. Cir. 1988).
 - 1. Attorney fees are within the discretion of the court when a FOIA plaintiff "substantially prevails." State of Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991); Education/Instruction, Inc. v. HUD, 649 F.2d 4 (1st Cir. 1981).
 - 2. Four factors that courts will generally consider to determine whether an award of fees and costs is appropriate under FOIA after determining the requester's eligibility:
 - a. Benefit to the public derived from the case,

- b. Commercial benefit to the requester,
- c. Nature of requester's interest in the records sought, and
- d. Whether the agency's withholding of records had a reasonable basis in law.

Church of Scientology v. USPS, 700 F.2d 486 (9th Cir. 1983);
LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980).

- 3. Test to determine whether a plaintiff "substantially prevailed" involves showing that prosecution of action was needed and that action had causative effect on delivery of information. DOJ v. Weisberg, 848 F.2d 1265 (D.C. Cir. 1988).
- 4. Commercial Requesters--those requesters seeking information for commercial gain should be allowed attorney fees only where there is clear and positive benefit to the public and where the agency withheld information without a reasonable basis in law. Tax Analyst v. U.S. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992); *Cf.* Aviation Data Service v. FAA, 687 F.2d 1319 (10th Cir. 1982).
- 5. No attorney fees for pro se litigants. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996).

- E. Six year statute of limitations for filing FOIA lawsuits. 28 U.S.C. § 2401; Spannus v. DOJ, 824 F.2d 52 (D.C. Cir. 1987).

VIII. FOIA ANALYSIS TEMPLATE. (APPENDIX A)

THE PRIVACY ACT

Outline of Instruction

IX. PRIVACY ACT (PA).

A. Primary References.

1. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended.
2. Privacy Act Implementation, Office of Management and Budget, 40 Fed. Reg. 28948 (9 July 1975) as amended 40 Fed. Reg. 56741 (4 December 1975).
3. Dep't of Defense Directive No. 5400.11, Department of Defense Privacy Program (13 December 1999).
4. Dep't of Defense Regulation No. 5400.11-R, Privacy Program (31 August 1983).
5. Army Regulation No. 340-21, The Army Privacy Program (5 July 1985).
6. Dep't of Army Pamphlet 25-51, The Army Privacy Program -- System Notices and Exemption Rules (21 September 1988).
7. Air Force Instruction 33-332, The Air Force Privacy Act Program (12 Oct 1999) *superseding* Air Force Instruction 37-132, The Air Force Privacy Act Program (11 March 1994).
8. Secretary of the Navy Instruction 5211.5D, Personal Privacy and Rights of Individuals Concerning Records Pertaining to Themselves (17 July 1992).
9. Marine Corps Order P5211.2B, The Privacy Act of 1974 (4 September 1997).

B. Secondary References.

1. Defense Privacy Office Web Page--to research current Privacy Act System of Records Notices and other Privacy Act guidance and information-- <http://www.defenselink.mil/privacy>.
2. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1 (18 April 1992).
3. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.
4. Freedom of Information Act Guide and Privacy Act Overview (May 2000), an biennial Department of Justice publication (available on the World Wide Web at <http://www.usdoj.gov/foia> -- requires an Acrobat reader).
5. Websites:
 - a. Army: <www.rmd.belvoir.army.mil/foiamain.htm> (does not contain Army systems notices – for Army systems notices use <www.defenselink.mil/privacy> and follow hyperlinks).
 - b. Navy: <privacy.navy.mil> (many hyperlinks to specific areas, including both Navy and Marine System Notices).
 - c. Air Force: <<https://aflsa.jag.af.mil>> (general site that requires FLITE password – follow hyperlinks to FOIA/Privacy information sites)

X. PRIVACY ACT INTRODUCTION.

- A. History of the Act.
- B. Congressional Concerns.
- C. Policy Objectives.
 - 1. Restrict Disclosure of Personal Information Maintained by Agencies.
 - 2. Allow Individuals Access to Records about Themselves.
 - 3. Allow Individuals Ability to Amend Records about Themselves.
 - 4. Establish Fair Collection, Maintenance and Dissemination Practices.

XI. SCOPE OF THE PRIVACY ACT.

- A. Generally Applicable to Agency Records within a “System of Records.” Manuel v. Veterans Administration Hospital, 857 F.2d 1112 (6th Cir. 1988).
- B. Key Definitions.
 - 1. Agency.
 - a. Privacy Act adopts the FOIA definition. § 552a(a)(1).
 - b. Government contractors and their employees are covered by the civil and criminal penalties of the Act, if provided for by the contract. § 552a(m).

2. "Individual" means a citizen or alien lawfully admitted for permanent residence. § 552a(a)(2).
 - a. Deceased personnel. Crompton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995).
 - b. Does not include corporations or business enterprises. St. Michael's Convalescent Hospital v. California, 643 F.2d 1369 (9th Cir. 1981).
3. "Maintain" means to maintain, collect, use, or disseminate. § 552a(a)(3).
4. "Record" means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or other identifying characteristic. § 552a(a)(4). See Unt v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985); see also Tobey v. NLRB, 40 F.3d 469 (D.C. Cir. 1994).
 - a. Entrepreneurial information -- Distinction between individuals and sole proprietorships. Sole proprietors are not "individuals" under the Privacy Act. See St. Michaels Convelescent Hosp.v. California, 643 F.2d 1369 (9th Cir. 1981).
 - b. Personal notes - DOD Reg. 5400.7-R, para. 1-402b(3); AR 25-55, para. 1-402b(4); SECNAVINST 5211.5D, para. 11a(10). See Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 38:

Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as a "group of any records under the control of any agency...from which information is retrieved by the ...[individual's] identifying particular..." [citation omitted]...Personal notes that are *merely an extension of the author's memory*, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act [citation omitted] (emphasis added)."

To avoid being considered agency records, personal notes must meet certain requirements. *Keeping notes must be at the sole discretion of the author.* Any requirement by superior authority,

whether by oral or written directive, regulation or command policy, likely would cause the notes to become official agency records. *Such notes must be restricted to the author's personal use as memory aids. Passing them to a successor or showing them to other agency personnel would cause them to become agency records* (emphasis added). Chapman v. National Aeronautics and Space Administration, 682 F.2d 525 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other personal particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, [they] would be subject to disclosure under the FOIA.

Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a \$5,000.00 fine. [citation omitted]. See also Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985).

- c. May incorporate personal notes into agency records in a timely manner. Compare Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982) with Thompson v. Dep't of Trans., 547 F. Supp. 274 (D. Fla. 1982).

- 5. A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual. § 552a(a)(5). Manuel v. VA, 857 F.2d 1112 (6th Cir. 1988); Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F.3d 1400 (D.C. Cir. 1995). Henke v. United States Dep't of Commerce, 83 F.3d 1453 (D.C. Cir. 1996). (holding that the test is whether the information is actually retrieved, not retrievable, by use of the individual's name or identifier). Smith v. Henderson, 1999 U.S. Dist. LEXIS 17575 (N.D. Cal. Oct. 29, 1999) (holding postal supervisor's "never-never drawer" not subject to the Privacy Act).

XII. PA PUBLIC NOTICE OF SYSTEMS OF RECORDS. § 552A(E)(4).

A. Publication Requirement (Federal Register and DA Pam 25-51; AF Pam 12-36; MC Bulletin 5211; and OPNAVNOTE 5211.

1. No longer an annual requirement.

2. New or altered system. § 552a(r); AR 340-21, para. 4-6; AFI 33-332. para. 6.2; SECNAVINST 5211.5D, Encl 2.

-- Advance notice to Congress and OMB is required.

B. Content of a system notice. § 552a(e)(4); AR 340-21, para. 4-6a.

C. Systems Notice Example

A0190-45 DAMO

System name:

Offense Reporting System (ORS) (February 22, 1993, 58 FR 10002).

System location:

Decentralized to Army installations which created the Military Police Report; copy may be sent to the U.S. Army Crime Records Center, Baltimore, MD, dependent on nature of crime (see Army Regulation 190-45, Records and Forms). A cross-reference index is either manual or automated media may exist at intermediate and higher command levels. In addition, information is stored on computer media at the four Army Information Processing Centers located at: Chambersburg, PA 17201-4150; Huntsville, AL 35898-7340; Rock Island, IL 61299-7210; and, St. Louis, MO 63120-1798.

Categories of individuals covered by the system:

Any individual who is the subject, victim, complainant, witness, or suspect in a criminal, civil, or traffic offense.

Categories of records in the system:

Criminal information or investigative files involving the Army which may consist of Military Police Reports (DA Form 3975) or similar reports containing investigative data, supporting or sworn statements, affidavits, provisional passes, receipts for prisoners or detained persons, Reports of Action Taken (DA Form 4833), and disposition of cases. Information contained on the DA Forms 3975 or 4833 may be provided by paper records, the Offense Reporting System (ORS), ORS-2, or Simplex Automated Military Police System (SAMPS). Personal information includes, but is not limited to name, Social Security Number, home address, telephone number, category of offense, involvement, and case number.

Authority for maintenance of the system:

10 U.S.C. 3013 and E.O. 9397 (SSN).

Purpose(s):

To provide detailed information necessary for Army officials and commanders to discharge their responsibilities for maintaining discipline, law, and order through investigation of complaints and incidents and possible criminal prosecution, civil court action, or regulatory order.

This system contains information which may be used, as permitted by the Privacy Act and other pertinent laws, for employee personnel actions and determinations concerning, but not limited to security clearances, recruitment, retention, and placement. Statistical data are derived from individual report and stored in automated media at major Army commands and Headquarters, Department of the Army, for the purposes of: (1) Developing crime trends by major categories (e.g., crimes against persons, drug crimes, crimes against property, fraud crimes, and other offenses), and (2) developing law enforcement and crime prevention programs to reduce or deter crime within Army communities.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows: Information may be disclosed to federal, state, and local (including Foreign Government) agencies for investigation and prosecution when cases are either within their jurisdiction or when concurrent jurisdiction applies. These include: Federal Bureau of Investigation, Drug Enforcement Administration, U.S. Customs Service, Bureau of Alcohol, Tobacco and Firearms, U.S. District Courts, U.S. Magistrates.

The 'Blanket Routine Uses' set forth at the beginning of the Army's compilation of systems of records notices also apply to this system.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage:

Paper records in file folders; microfiche; magnetic tapes/discs; punched cards; computer printouts.

Retrievability:

By individual's name, date of birth, Social Security Number, and case number.

Safeguards:

Access to information is controlled; limited to authorized personnel having official need therefor. Regional Data Centers are contractor-operated under an Army approved security program. Contractor personnel participate in an on-going security education program under the Regional Data Security Officer. Regional Data Centers are connected through a communications network to 44 distributed data processing centers at Army installations. Technical, physical, and administrative safeguards required by Army Regulation 380-19 are met at installation data processing centers. Data are available only to installation personnel responsible for systems operation and maintenance. Terminals not in the data processing center are under the supervision of a terminal area security office at each remote location protecting them from unauthorized use. Access to information is also controlled by a system of assigned passwords for authorized users of terminals.

Retention and disposal:

Information is destroyed after 5 years except for that required by Army Regulation 190-45 to be sent to the Crime Records Center where it is retained 40 years following final action.

System manager(s) and address:

Deputy Chief of Staff for Operations and Plans, ATTN: DAMO-ODL, Headquarters, Department of the Army, Washington, DC 20310-0440.

Notification procedure:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the commander of the installation where the incident occurred.

If more than five years have elapsed since the occurrence, Individual should address written inquiries to the U.S. Army Crime Records Center, Baltimore, MD.

Individual should provide the full name, Social Security Number, date and place of the incident, and a notarized signature.

Record access procedures:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the commander of the installation where the incident occurred.

If more than five years have elapsed since the occurrence, Individual should address written inquiries to the U.S. Army Crime Records Center, Baltimore, MD.

Individual should provide the full name, Social Security Number, date and place of the incident, and a notarized signature.

Contesting record procedures:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.

Record source categories:

From the individual; witnesses; victims; Military Police and/or U.S. Army Criminal Investigation Command special agents; informants; investigative and law enforcement persons of Federal, state, local and foreign government agencies; any source that may supply pertinent information.

Exemptions claimed for the system:

Part of this system may be exempt under 5 U.S.C. 552a(j)(2), as applicable.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 505. For additional information contact the system manager.

XIII. PA COLLECTION AND MAINTENANCE OF INFORMATION. § 552A(E).

A. **Collect Only Relevant and Necessary Information to Accomplish an Agency Purpose as Defined by Statute or Executive Order.** § 552a(e)(1); AR 340-21, para. 4-1c; AFI 33-332, para. 1.1.3.2; SECNAVINST 5211.5D, para. 7(b)

B. **Collect Information to Greatest Extent Practical Directly from the Individual.** §552a(e)(2).

1. Collect from the Subject First when the information sought is “objective and unalterable.” Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989); Dong v. Smithsonian, 943 F. Supp. 69 (D.D.C. 1996), rev'd on other grounds, 125 F.3d 877 (D.C. Cir. 1997) (holding that concerns over Plaintiff's possible reaction to an unpleasant rumor" does not excuse requirement of collection from the individual).

2. Collect from third parties when:.

a. Verifying information (Security or Employment).

b. Seeking Opinion or Evaluation.

c. Unable to Contact Subject.

d. Collecting is Exceptionally Difficult (Unreasonable cost or delay).

e. Consent or Subject Asks for Third Party Collection.

See, AR 340-21, para. 4-1d; AFI 33-332, para. 3.1; SECNAVINST 5211.5D, para. 10(b)

C. **Maintain No Records Regarding How an Individual Exercises First Amendment Rights.** § 552a(e)(7); AR 340-21, para. 4-5; SECNAVINST 5211.5D, para. 7d(1).

1. Exceptions.

- a. Authorized by statute. Hass v. United States Air Force, 848 F. Supp. 926 (D. Kan. 1994).
 - b. Consent of the subject.
 - c. Pertinent to and within the scope of an authorized law enforcement activity. Compare Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) with Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).
 - 2. Applies to All records regardless of where maintained. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983)(holding that PA prohibition regarding collecting First Amendment information applied even when record not maintained in a system of records).
- D. **The Privacy Act Advisement.** § 552a(e)(3); AR 340-21, para. 4-2; AFI 33-332, para. 6.1; SECNAVINST 5211.5D, para. .
- 1. When required.
 - a. To individuals. When collecting personal information to be kept in a system of records. AR 340-21, para. 4-2a.
 - b. To third party sources of information. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981).
 - 2. Content.
 - a. Authority.
 - b. Principal Purpose.
 - c. Routine uses.
 - d. Voluntary or mandatory.
 - e. Effect of not providing.

3. Location of Advisement. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 18.

E. Accuracy Requirements.

1. Maintain records used to make determinations about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5). Perfect records are not required; reasonableness is the standard. Doe v. United States, 821 F.2d 694 (D.C. Cir. 1987)(en banc); Edison v. Dep't of the Army, 672 F.2d 840 (11th Cir. 1982).
2. Before disseminating the record to a person other than an agency, unless disseminated pursuant to FOIA, the agency will make reasonable efforts to ensure the records are accurate, complete, timely and relevant for agency purposes. 5 U.S.C. § 552a(e)(6).

XIV. PA ACCESS TO AND AMENDMENT OF RECORDS. § 552A(D).

- A. References: §§ 552a(d)(1) and (2); AR 340-21, Ch. 2; SECNAVINST 5211.5D, Ch.. ; AFI 33-332, Ch. 4 (Access) and Ch. 5 (Amendment).

- B. Each agency that maintains a system of records **shall**:

1. Access: “upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made” § 552a (d)(1)
2. Amendment: “permit the individual to request amendment of a record pertaining to him” § 552a(d)(2).

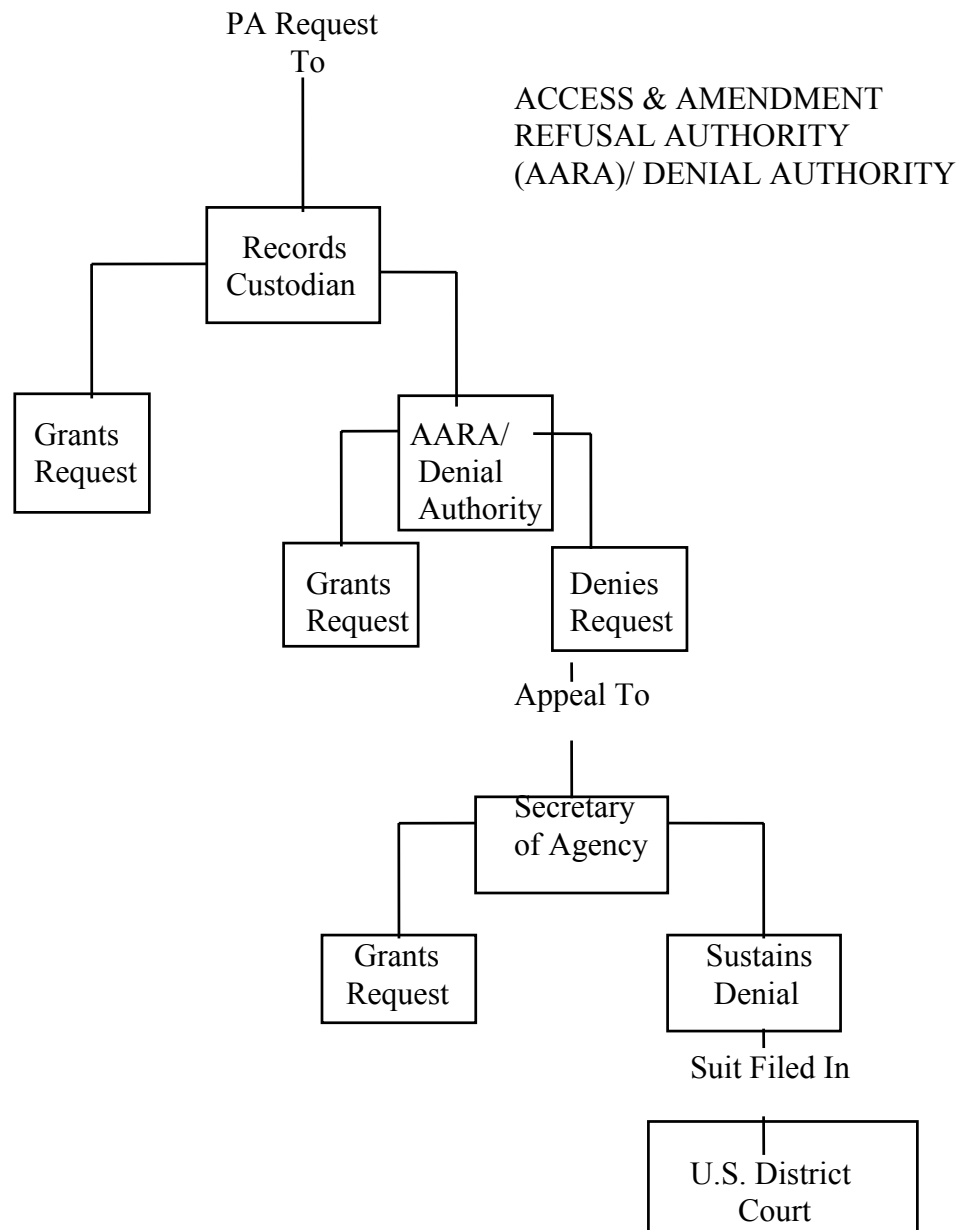
- C. Burdens of Proof.

1. Access. § 552a(g)(3)(A). Burden on agency with de novo review.

2. Amendment. § 552a(d)(2)(B)(i). Burden on plaintiff to prove record not accurate, relevant, timely or complete. Mervin v. FTC, 591 F.2d 821 (D.C. Cir. 1978).

D. Processing an Access or Amendment Request.

ACCESS & AMENDMENT REQUEST



E. Time Limits.

1. Access. 10 work days to acknowledge request. Release within 30 workdays. AR 340-21, paras. 2-2 & 2-9 (5 workdays to forward denial recommendation to AARA); AFI 33-332, para. 4.2.3; SECNAVINST 5211.5D, para. 11b(12).
2. Amendment.
 - a. Custodian/System Manager: 10 workdays to acknowledge, 30 workdays to make final response. § 552a(d); AR 340-21, para. 2-11, AFI 33-332, para. 5.2.3; SECNAVINST 5211.5D, para. 12f.
 - b. Denial/Refusal Authority
 - (1) Army - Access and Amendment Refusal Authority (AARA) – Army AR 340-21, para. 1-7. No specified time limit.
 - (2) Air Force - Denial Authority, AFI 33-332, para. 5.3. No specified time limit.
 - (3) Navy/Marines – Denial Authority, SECNAVINST 5211.5D, para. 6(e).
 - c. Appeal:
 - (1) Requester – 60 calendar days to appeal. AFI 33-332, para. 5.5; SECNAV 5211.5D, para. 13a(1).
 - (2) Review Authority:
 - (a) Army – DA Privacy Review Board w/ OGC concurrence. 30 workdays (30 more for “good cause”) AR 340-21, para. 2-11h.
 - (b) Air Force – Through HQ AFCIC/ITC to SAF/GCA. No time limit to respond. AFI 33-332, para. 5.5.2

- (c) Navy/Marine – ASN, NJAG, OGC, OPM. 30 working days to respond. SECNAVINST 5211.5D, para. 13f.

F. Access Issues.

1. Third party information in the subject/requester's file.
 - a. Definition of a “record.” Is the information "about" the requester?
 - b. If not, see Voelker v. IRS, 646 F.2d 332 (8th Cir. 1981); compare DePlanche v. Califano, 549 F. Supp 685 (W.D. Mich. 1982).
2. Medical records of minors. DOD Reg. 5400.11-R, ch. 3, para. 6e; see also AR 40-66, chapter 2; SECNAVINST 5211.5D, para. 11a(8); AFI 33-332, para. 9.5.
 - a. The Privacy Act applies to "[citizens] of the United States or [aliens] lawfully admitted for permanent residence." Minors are protected by the Act because minority is not a disqualifier. § 552a(a)(2), see also Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 9.
 - b. The Privacy Act provides that "the parent of any minor...may act on behalf of the individual." § 552a(h).
 - c. Stateside.
 - (1) Definition of minor? State law.
 - (2) If a minor, may release records to parents unless prohibited by state law. AR 40-66, para. 2-5(a)(1); DA Pam 340-6, No. 27.

- (3) Look to the law of the state in which the records are located--the states differ on the question of access to a minor's medical records based, in part, on subject matter (e.g., psychiatric records, treatment records for drug and alcohol abuse, sexual hygiene/reproductive records).

d. Overseas.

- (1) Definition of minor? The Army deems the age of majority to be 18 years. DA Pam 340-6, No. 45.
- (2) Parental access. Parents have a general right of access to medical records of minors.
- (3) Parents may be denied access only if **all** of the following four conditions are met:
 - (a) Minor was between ages 15 and 17 at the time of treatment.
 - (b) Treatment sought in program that promised to keep treatment records confidential.
 - (c) Minor specifically requested confidentiality.
 - (d) Parent did not have the minor's written authorization or a court order.

3. Access denied under PA, but accessible under FOIA.

- a. PA is not a FOIA exemption 3 withholding statute. Provenzano v. DOJ, 717 F.2d 799 (3d Cir. 1983), vacated as moot, 469 U.S. 14 (1984).
- b. Clarified by Legislation. CIA Information Act, Pub. L. No. 98-477, § 2(c), 98 Stat. 2211, 2212 (1984) (codified at 5 U.S.C. § 552a(t)(2)).

G. Amendment Issues.

1. No Collateral Attack.

- a. Issues already the subject of judicial or quasi-judicial action. Spurge v. Derwinski, 26 F. 3d 8 (2d Cir. 1994).
- b. Issues for which adequate judicial review is available. Henderson v. Social Security Administration, 908 F.2d 559 (10th Cir. 1990).
- c. Exhaustion of administrative remedies. Cargill v. Marsh, 902 F.2d 1006 (D.C. Cir. 1990)

2. Facts v. Judgment.

- a. May only correct facts, not judgments, under the Act. AR 340-21, para. 2-10a; Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 4; Hewitt v. Grabicki, 794 F.2d 1373 (9th Cir. 1986).
- b. Can amend judgments only if all underlying facts are discredited. RR v. Dep't of Army, 482 F. Supp. 770 (D.D.C. 1980) (dictum).

XV. PA EXEMPTIONS. §§ 552A(J) AND (K).

A. Exemptions Deny a Subject Access to His Own Records.

B. Claiming Exemptions.

- 1. Exemptions are not automatic.
- 2. Agencies are not entitled to improperly claimed exemptions. Ryan v. Dep't of Justice, 595 F.2d 954 (4th Cir. 1979).

C. Two General Exemptions. § 552a(j)(1)-(2).

1. What records are exempt?
 - a. Maintained by the CIA. § 552a (j)(1).
 - b. Maintained by an agency/component thereof which performs as its principal function any activity pertaining to law enforcement.
§ 552a (j)(2)
2. According to the Defense Privacy Board, the exemption does not follow the record. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 31. But see Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991).

D. Seven Specific Exemptions. § 552a(k)(1)-(7).

1. What records are exempt?
 - a. Classified information (simply incorporates FOIA exemption 1 protections in the Privacy Act context).
 - b. Investigatory material compiled for law enforcement purposes not covered by § 552a(j)(2).
 - c. Protective services to the President.
 - d. Statistical records.
 - e. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified material. Limited to the protection of a confidential source who provided the information pursuant to an express promise of confidentiality.
 - (1) Also includes material compiled to determine whether a federal grant will be awarded. Henke v. United States Dep't of Commerce, 83 F.3d 1445 (D.C. Cir. 1996).

- (2) Applicable even though the source of the confidential information is known to the requester. Volz v. Dep't of Justice, 619 F.2d 49 (10th Cir.).
 - f. Testing or examination material used solely to determine individual qualifications for appointment/ promotion in Federal service.
 - g. Evaluation material used to determine potential for promotion in the armed services. Limited to the protection of a confidential source. May v. Dep't of Air Force, 777 F.2d 1012 (5th Cir. 1985).
- E. One Special Exemption. § 552a(d)(5).
- 1. Information compiled in reasonable anticipation of civil litigation.
 - 2. Self-executing.
 - 3. Applies to administrative proceedings. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 27.

XVI. PA DISCLOSURE OF INFORMATION SOR, § 552A(B).

- A. Disclosure Prohibited. The "no disclosure without consent" rule:
"No agency shall disclose any record . . . except pursuant to a written request by or with the prior written consent of the individual to whom the records pertains, unless an exception applies."
- 1. Disclosure must be from a system of records.
 - a. Pertains to information initially retrieved from a system of records. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).

- b. Personal opinion or knowledge from memory not from a system of records. Kline v. HHS, 927 F.2d 522 (10th Cir. 1983) (holding that verbal information about employee derived from independent knowledge and not from an agency system of records are not subject to the Privacy Act.).
 2. A later release of information previously known does not violate the Privacy Act. Hollis v. Department of the Army, 856 F.2d 1541 (D.C. Cir. 1988). (holding that when a release of servicemember's child care allotments consisted merely of information . . . which the recipient of the release already knew, the Privacy Act is not violated"); FDIC v. Dye, 642 F.2d 833 (5th Cir. 1981). But see Pilon v. Department of Justice, 73 F.3d 1111 (D.C. Cir. 1996) (holding that faxing a PA protected document to a person with familiarity of its existence does not remove it from PA protection).
 3. Privacy Act is not limited to extra-judicial disclosures; it applies even where a disclosure to a court during the course of litigation is undertaken. See Laningham v. Navy, 813 F.2d 1236 (D.C. Cir. 1987) (per curium) (holding that Navy did not intentionally and willfully disclose disability board information in civil trial in violation of PA).
- B. 12 Exceptions to the "no disclosure without consent" rule permit access to information without prior written consent of the subject of the record. § 552a(b)(1)-(12).
 1. Exception 1. Disclosure within the agency (DOD) to those having a need to know the information in performing their duties.
 - a. Contractors who operate a system of records to accomplish an agency mission are considered part of an agency. See Coakley v. Department of Transportation, No. 93-1420 (D.D.C. Apr. 7, 1994); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 16; But see Taylor v. Orr, (D.D.C. Dec. 5, 1983).
 - b. Lists of nonparticipants/nonmembers.

- (1) Savings bond programs. Parks v. IRS, 618 F.2d 677 (10th Cir. 1980); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 37.
- (2) Officers' Clubs.
- (3) AUSA.

2. Exception 2. Disclosure required by FOIA.

a. FOIA and Privacy Act interface.

- (1) FOIA Exemption 6: Protection of Personal Privacy.
- (2) FOIA Exemption 7(C): Records or Information Compiled for Law Enforcement Purpose.

b. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

-- Public Interests in Disclosure v. Invasion of Privacy.

c. Specific applications of the balancing test.

- (1) Some information normally is releasable:
- (2) Most interests will not outweigh the invasion of personal privacy.

d. No discretionary release.

- (1) No agency "discretionary disclosure" of information that is exempt under FOIA and subject to the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

- (2) Agency must have an actual FOIA request to rely on exception 2. OMB Memorandum for the Senior Agency Officials for Information Resources Management, SUBJECT: Privacy Act Guidance - Update, dtd 24 May 1985; Compare Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984) with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985).
 - e. Categorical Balancing Requiring Release. Military personnel information, such as: name, rank, gross salary, duty assignments, duty telephone, etc., may be released. AR 340-21, para. 3-3.
3. Exception 3. Disclosure for routine use.
- a. Specific routine uses as listed in systems notices, DA Pam 25-51, AFP 12-36, OPNAVNOTE 5211, MCBUL 5211.
CAUTION: Printed systems notices are often out of date. Use on-line sources for most current systems notices.
 - b. Compatibility requirement. Disclosure of record must have compatible purpose for which it was collected. § 552a(a)(7). Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989) (holding that transfer of Marine Reservist's military criminal investigation file did not meet PA compatibility requirement); Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989).
 - c. General/blanket routine uses. AR 340-21, para. 3-2. These include:
 - (1) To law enforcement agencies when record indicates a violation or potential violation of law.
 - (2) To other federal agencies on request for hiring, retention, security clearance, or licensing decisions by those agencies.
 - (3) Congressional inquiries and private relief legislation. Pellerin v. VA, 790 F.2d 1553 (11th Cir. 1986). But see Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989) (disclosure beyond scope of inquiry).

- (4) Required by international agreement.
 - (5) To DOJ for litigation.
 - (6) Counter-intelligence purposes or enforcing laws which protect the national security.
- 4. Exception 4. Bureau of Census.
- 5. Exception 5. Statistical research.
- 6. Exception 6. National Archives.
- 7. Exception 7. Law enforcement. Disclosure may be made without the consent of the subject of a record in response to the request of a law enforcement agency. The request must be submitted in writing form the head of the agency.
- 8. Exception 8. Compelling circumstances affecting health or safety of the individual.
 - a. Case law emphasizes emergency nature of exception.
 - b. Disclosure notification must be sent to last known address.
 - c. Individual about whom records are disclosed need not necessarily be the individual whose health or safety is at peril; e.g., release of records on several individuals in order to identify an individual who was injured in an accident. See OMB's Privacy Act Guidelines, 40 Fed. Reg. 28,955 (1975); DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982).
- 9. Exception 9. Congress. Disclosure may be made to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee [thereof]."

10. Exception 10. Comptroller General.
 11. Exception 11. Pursuant to the order of a court of competent jurisdiction.
 12. Exception 12. Credit reporting agencies.
- C. Accounting for Disclosure. § 552a(c).
1. Disclosure accounting is required unless the record is disclosed within the agency (exception 1) or pursuant to FOIA (exception 2). AR 340-21, para. 3-4, AFR 12-35, para. 19(d).
 2. Accounting must include the date, nature, and purpose of disclosure and the name and address of the recipient.
 3. Uses of Disclosure Accounting Record (DA Form 4410-R).

XVII. SOCIAL SECURITY NUMBERS.

- A. Section 7(a)(1). (Enacted as part of the Privacy Act, but not codified.). No Federal, State, or Local Governmental Agency can Deny a Right, Privilege or Benefit Because of Refusal to Disclose Social Security Account Number, unless
1. Required by Federal statute, or
 2. Disclosure was required under any Federal, state, or local statute or regulation in existence and operating before 1 January 1975 to verify the identity of the individual.
- B. Requests by agency for SSN requires informing whether disclosure is mandatory or voluntary, by what statutory authority, and what use will be made of it. Sec. 7(b).

XVIII. PA CRIMINAL PENALTIES. § 552A(I).

- A. Knowingly/Willfully Making Prohibited Disclosure. See, e.g., United States v. Trabert, 978 F.Supp 1368 (D.Colo. 1997)
- B. Willfully Maintaining a System of Records Without Complying with Notice Requirements.
- C. Knowingly/Willfully Requesting/Obtaining Information Under False Pretenses.
- D. Action is against the individual and not the agency.

XIX. PA CIVIL REMEDIES.

A. Statutory. § 552a(g).

<u>VIOLATION</u>	<u>REMEDY</u>
Wrongful refusal to amend. § 552a(g)(1)(A). § 552a(g)(2).	Enjoin/order amendment; attorney fees/costs.
Wrongful denial of access. § 552a(g)(1)(B)	Enjoin from withholding; provide <u>in camera</u> inspection; attorney fees/costs. § 552a(g)(3).
Failure to maintain accurate, timely, complete, and relevant records resulting in an adverse determination. § 552a(g)(1)(C).	If agency acted in an intentional/willful manner, U.S. is liable for: a) Actual damages but not less than \$1,000. b) Attorney fees and costs. § 552a(g)(4).
Failure to comply with another provision causing an adverse effect. § 552a(g)(1)(D).	If agency acted in an intentional/willful manner, U.S. liable for: a) Actual damages but not less than \$1,000. b) Attorney fees/costs. § 552a(g)(4).

1. Civil remedies are solely against the agency.
2. Courts are not free to create remedies greater than those granted by the statute. Edison v. Dep't of Army, 672 F.2d 840 (11th Cir. 1982).
3. Intentional/willful refers to the intentional or willful failure to abide by the Act. Andrews v. VA, 838 F.2d 418 (10th Cir. 1988); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987); Albright v. U.S., 732 F.2d 181 (D.C. Cir. 1984).

4. Privacy Act does not mandate agency to create and maintain files, and destruction of an official record does not give right to a Privacy Act cause of action. Tufts v. Dep't of Air Force, 793 F.2d 259 (10th Cir. 1986).
 5. Damages. Alexander v. FBI, et al., 193 F.R.D. 1 (D.D.C. March 29, 2000)(compelling further discovery regarding "Filegate" letters in PA suit for damages against the Executive Office of the President); Tripp v. Executive Office Of The President, et al., 104 F. Supp. 2d 30 (D.D.C. June 14, 2000) (denying motion to recuse in PA damages suit against EOP and DoD).
 6. Attorney's Fees.
 - a. Purpose of granting attorney fees. Anderson v. Dep't of Treasury, 648 F.2d 1 (D.C. Cir. 1979).
 - b. Threshold requirement: plaintiff must substantially prevail. Sweatt v. U.S. Navy, 683 F.2d 420 (D.C. Cir. 1982).
 - c. Factors considered in granting this discretionary remedy. Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981).
 - d. Only permitted for litigation; not administrative actions. Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978), aff'd, 612 F. 2d 586 (D.C. Cir. 1980)(table cite).
 - e. Not paid to a pro se litigant even if plaintiff is an attorney. Manos v. Department of the Air Force, 829 F. Supp. 1191 (N.D. Cal. 1993).
 7. Two-year statute of limitations governs Privacy Act actions. § 552a(g)(5). Bower v. Department of Air Force, 875 F.2d 632 (7th Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).
- B. Constitutional Tort. Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985).
- a. The Privacy Act is not intended as an exclusive remedy.

- b. Recording and disseminating derogatory information without notice and the opportunity to refute may amount to a violation of due process guaranteed by the Fifth Amendment.
- c. Individual defendants are subject to qualified immunity and personal liability. Note that liability is limited by Chappell v. Wallace, 462 U.S. 296 (1983), and Bush v. Lucas, 462 U.S. 367 (1983).

XX. CONCLUSION.

